Office-Supreme Court, U.S.
FILED
AUG 17 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1290

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM

WILLIAM P. CLEMENTS, JR., GOVERNOR of the State of Texas, et al.,

Appellants

VS.

JOHN L. FASHING, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

MARK WHITE
Attorney General of Texas

JOHN FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State and County Affairs

JAMES P. ALLISON
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
512/475-3131

Attorneys for Appellants

RAYMOND C. CABALLERO
521 Texas Avenue
El Paso, Texas 79901
915/542-4222

Attorney for Appellees

APPEAL DOCKETED JANUARY 21, 1981
PROBABLE JURISDICTION NOTED JUNE 1, 1981

TABLE OF CONTENTS

Page

Relevant Docket Entries ii

Plaintiffs' Motion for Summary Judgment 1

Defendants' Cross-Motion for Summary Judgment 2

Answers to Interrogatories from Defendants Honorable Dolph Briscoe, John L. Hill, and Steven Oaks 3

Memorandum Opinion and Order 12

Judgment 20

Order Granting Injunction 21

Per Curiam Order 22

RELEVANT DOCKET ENTRIES

1. July 10, 1978; Original Complaint filed

2. August 10, 1978; Defendants' Motion to Dismiss and Answer filed

3. November 11, 1978; Plaintiffs' Motion for Summary Judgment filed

4. December 12, 1978; Defendants' Cross-Motion for Summary Judgment filed

5. December 26, 1979; Answers to Interrogatories from Defendants Honorable Dolph Briscoe, John L. Hill and Steven Oaks filed

6. January 23, 1980; Memorandum Opinion and Order and Judgment filed

7. January 25, 1980; Order Granting Injunction filed

8. February 4, 1980; Defendants' Notice of Appeal from Orders entered on January 23, 1980 and January 25, 1980 filed

9. October 31, 1980; Judgment of the United States Court of Appeals for the Fifth circuit filed

10. November 26, 1980; Judgment of October 31, 1980 issued to clerk as Mandate

11. January 21, 1981; Notice of Appeal to the Supreme Court of the United States filed

12. June 1, 1981; Order noting probable jurisdiction filed in the United States Supreme Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JOHN L. FASHING, et al.,
Plaintiffs

V.

JUDGE T. UDELL MOORE, et al.,
Defendants

NO. EP-78-CA-126

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Plaintiffs move the Court, pursuant to Rule 56 of the Rules of Civil Procedure, to enter judgment for the Plaintiffs for the relief demanded in their complaint, on the ground that there is no genuine issue as to any material fact in this action and that Plaintiffs are entitled to a judgment as a matter of law, as appears from the pleadings and the answer filed by the Defendants represented by the El Paso County Attorney in which they admit all facts alleged in Plaintiffs' Complaint and that Section 65 of Article XVI, Texas Constitution, is unconstitutional, Stipulation Number One, Stipulation Number Two which has not been signed by the Texas Assistant Attorney General, the interrogatories propounded and their answer, and the affidavits of Woodrow W. Bean, F.B. Escobar, Jr., Phillip E. Bargman, Mrs. Guadalupe R. Manago, James L. Lee,

John Galvan, Daniel M. Anchondo, Enrique Pena, Lloyd McConnell, Arthur Abraham, Mrs. Luisa G. Ybarra, George McAlmon, Sam W. Callan, Roger Moore, William V. Fashing, Colbert Coldwell, Sam M. Paxson, John L. Fashing, Jose J. Baca, C. Johnny Ybarra, Loretta A. Doerr, LaDonna McConnell, Sam Snoddy, Walter McGhee, Sam Blackham, Bill Eubank, James Heathman, and other persons indicated in said affidavits attached hereto and made a part of this Motion.

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JOHN L. FASHING, et al.,
Plaintiffs

V.

JUDGE T. UDELL MOORE, et al.,
Defendants

NO. EP-78-CA-126

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Defendants move this Court, pursuant to Federal Rule of Civil Procedure 56, to enter judgment for Defendants and against Plaintiffs. Defendants agree that there is no material issue of fact in this action. Defendants are entitled to a judgment as a matter of law, as

appears from the pleadings, stipulation, interrogatories and affidavits filed in this action, that Section 65 of Article XVI, Texas Constitution and Section 19 of Article III, Texas Constitution are constitutional.

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JOHN L. FASHING, et al.,
Plaintiffs

V.

JUDGE T. UDELL MOORE, et al.,
Defendants

NO. EP-78-CA-126

ANSWERS TO INTERROGATORIES
FROM DEFENDANTS
HONORABLE DOLPH BRISCOE,
JOHN L. HILL AND STEVEN OAKS

1. List all Texas State interests that support the constitutionality of the resign-to-run rule of Article XVI, Section 65, Texas Constitution.

   (a) Compels officeholders to give undivided attention to his/her office for at least three years of a four year term;

   (b) Prevents abuse of office during campaign and post campaign if officeholder loses;

(c) Eliminates appearance of impropriety during and after campaign.

2. Set forth all Texas State interests that support the constitutionality of the ineligibility to seek office rule of Article III, Section 19, Texas Constitution.

(a) Prevents conflicts of interest.

3. List all differences between Texas Appellate Judges or Justices, Texas District Court Judges, and Texas County Court at Law Judges that support the application of the resign-to-run rule of Article XVI, Section 65, Texas Constitution, against a County Court at Law Judge, but not against Texas Appellate Judges or Justices and District Court Judges.

(a) The amendment to the Texas Constitution, Article XVI, Section 65, occurred in 1954 and was coupled with legislation which allowed the listed officeholders to serve terms up to four years. The nonlisted judicial posts were increased to four year terms in 1949 and apparently the legislature did not see fit to pass legislation comparable to Section 65 at that time. In 1954 the question was not before them.

4. State whether the Texas State interests to be advanced in the resign-to-run rule of Article XVI, Section 65, Texas Constitution, are the same in regard to all the judiciary within the State of Texas.

(a) No information available as issue was not before the legislature in 1954.

5. State the Texas State interests that support the application of the resign-to-run rule of Article XVI, Section 65, Texas Constitution, against only part of the Judiciary within the State of Texas.

   (a) Same answer as to Interrogatories Three and Four.

6. State the Texas State interests that support the application of the resign-to-run rule of Article XVI, Section 65, Texas Constitution, against a County Court at Law Judge and the other members of the Judiciary named in said Constitutional provision who seek election to another judicial office.

   (a) Same answer as to Interrogatories Three and Four.

7. State the Texas State interest that support permitting a Texas District Court Judge and Texas Appellate Judges or Justices to announce his candidacy or in fact become a candidate in general, special or primary election, for another Texas judicial office at a time when the unexpired term of his office then held exceeds one year without being required to resign by law the judgeship then held.

   (a) Same answer as to Interrogatories Three and Four.

8. State the Texas State interests that support permitting a Texas District Court Judge and Texas Appellate Judges or Justices to announce their candidacy or in fact become a candidate, in a general, special or primary election, for a non-judicial office at a time when the unexpired term of his office then held exceeds one year without being required to resign by law the judgeship then held.

(a) Same answer as to Interrogatories Three and Four.

9. State how a Texas County Court at Law Judge could abuse his office while being a candidate for another judicial office.

(a) Judicial rulings could be influenced by the presence or absence of political support by litigants appearing before the particular judge.

(b) Court personnel and services could be utilized for campaign purposes.

10. State how a Texas County Court at Law Judge can abuse his office while being a candidate for a non-judicial office.

(a) Same answer as to Interrogatory Nine.

11. State how a Texas State District Judge could abuse his office while being a candidate for another judicial office.

(a) Same answer as to Interrogatory Nine.

12. State how a Texas State District Judge could abuse his office while being a candidate for non-judicial office.

(a) Same answer as to Interrogatory Nine.

13. State what the improprieties would be that the State would prevent by the application of the resign-to-run rule of Article XVI, Section 65, Texas Constitution, in regard to each office named in Article XVI, Section 65, Texas Constitution.

(a) The balanced non-paratisan image of the judiciary is compromised by partisan political activities or statements. The resignation eliminates such appearance of impropriety.

(b) With respect to non-judicial officeholders listed in Section 65 any areas which allow for discretionary acts within the officeholders position require the appearance of objective evenhandedness. Political activities compromise this evenhanded appearance.

14. State what the improprieties would be that the State could prevent by the application of the resign-to-run rule of Article XVI, Section 65, Texas Constitution, to all elected officers within the State of Texas who are not now named in Article XVI, Section 65, Texas Constitution.

(a) With respect to judicial offices the answer is the same as to Interrogatory Thirteen, part (a).

(b) With respect to non-judicial officeholders the answer is the same as to Interrogatory Thirteen, part (b).

15. State what the abuse of office that would be prevented by the application of the resign-to-run rule of Article XVI, Section 65, Texas Constitution, to all elected officers within the State of Texas who are not now named in Article XVI, Section 65, Texas Constitution.

(a) The facilities and personnel of the given office could be utilized for campaign purposes.

(b) The power of the office could be traded for political support.

16. List all of the elected offices within the State of Texas that are not subject to the resign-to-run of Article XVI, Section 65, Texas Constitution.

    (a) Defendants object to this Interrogatory as the information is public record and equally available to plaintiffs as to defendants.

17. State why the resign-to-run rule of Article XVI, Section 65, Texas Constitution, does not apply to the Judge of the County Criminal Court of Appeals of Dallas County, Texas (Article 1970-31.20, V.A.T.S.), the Judge of County Civil Courts of Law of Harris County, Texas (Article 1970-110e, V.A.T.S.), the Judge of the County Court of Bexar County for Criminal Cases (Article 1970-301g, V.A.T.S.), the Judge of County Court Number 1 of Galveston County, Texas (Article 1970-342a, V.A.T.S.) and Judges of Municipal Courts of El Paso, Texas (1200d and 1200ee, V.A.T.S.)

    (a) The answer is the same as to Interrogatories Three and Four.

18. State how resign-to-run rule of Article XVI, Section 65, will insure the actual and perceived integrity of the Texas Judiciary when said rule does not apply to all members of the Texas Judiciary.

    (a) The answer is the same as to Interrogatories Three and Four.

19. If one of the interests of the State is to prevent abuse of Judicial office by a judge-candidate during the course of a campaign, state why the resign-to-run rule only applies at a time when the unexpired term of a judge, who is subject to said rule, exceeds one year.

(a) Allowing political activity during the last year of an officeholder's term is merely recognition of the fact that the officeholder must seek re-election in any event. It is a compromise to the fact of the political process.

20. If one of the interests of the State is to prevent abuse of judicial office by judges who have lost their election bids and return to the bench, state why the resign-to-run rule only applies to those judicial officers named in Article XVI, Section 65, Texas Constitution, and not to all other judicial offices.

(a) The answer is the same as to Interrogatories Three and Four.

21. If one of the interests of the State is to prevent abuse of Judicial office by a judge-candidate during the course of a campaign, state why the resign-to-run rule only applies to those judicial offices named in Article XVI, Section 65, Texas Constitution, and not to all other judicial offices.

(a) The answer is the same as to Interrogatories Three and Four.

22. If one of the interests of the State is to prevent abuse of judicial office by judges who have lost their electoral bids and return to the bench, state why the resign-to-run rule only applies at a time when the unexpired term of a judge, who is subject to said rule, exceeds one year.

(a) The answer is the same as to Interrogatory Nineteen.

23. If one of the interests of the State is to eliminate even the appearance of impropriety by judges both during and after a campaign, state why the resign-to-run rule only applies to those judicial officers named in Article XVI, Section 65, Texas Constitution, and not to all other judicial offices, and only at a time when the unexpired term of office then held exceeds one year.

    (a) The answer is the same as to Interrogatories Three, Four and Nineteen.

24. List the differences between those judicial offices names in Article XVI, Section 65, Texas Constitution, and the judicial offices not named in said constitutional provision that justifies the application of the resign-to-run rule against the second group of judicial officers.

    (a) The answer is the same as to Interrogatories Three and Four.

25. List the differences between these non-judicial officers named in Article XVI, Section 65, Texas Constitution, and the non-judicial officers not named in said constitutional provisions that justify the application of the resign-to-run rule against the first group of non-judicial officers and not against the second group of non-judicial officers.

    (a) The answer is the same as to Interrogatories Three and Four.

26. List the differences between all those officers named in Article XVI, Section 65, Texas Constitution and all officers not named in said constitutional provisions that justify the application of the resign-to-run rule against the first group of officers and not against the second group of officers.

(a) The answer is the same as to Interrogatories Three and Four.

27. State the differences between those officers named in Article III, Section 19, Texas Constitution, and those elected public officials within the State of Texas not named in said constitutional provisions that justify the application of the ineligibility to seek office rule of said constitutional provisions against the first group and not against the second group.

(a) Article III, Section 19 applies to all holders of a lucrative office. As the provision is to prevent conflict of interest it bars all persons without distinction who by virtue of state employment might have a conflict.

28. State all of the elected offices within the State of Texas that are not subject to the ineligibility to seek office rule of Article III, Section 19, Texas Constitution.

(a) Any holders of a non-lucrative office.

29. State the Texas State interests that support permitting a member of the Texas State Legislature to seek judicial or executive office during his term of office in the legislature.

(a) The conflict of interest is not present when a lawmaker leaves the lawmaking position.

30. State the differences between members of the Texas Legislature and those officers named in Article III, Section 19, Texas Constitution, that justify the ineligibility to seek office rule of Article III, Section 19, Texas Constitution, with there being no exact same rule for the members of the Texas Legislature.

(a) The answer is the same as to Interrogatory Twenty-Nine.

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JOHN L. FASHING, et al,
Plaintiffs

v.

JUDGE T. UDELL MOORE, et al,
Defendants

NO. EP-78-CA-126

MEMORANDUM OPINION AND ORDER

Plaintiffs bring this action under the Civil Rights Act of 1871, 42 U.S.C. §1983, and the Declaratory Judgement Act, 28, U.S.C. §§2201, 2202, seeking to challenge the constitutionality of Article III, Section 19, and Article XVI, Section 65, of the Constitution of Texas. Some of the Plaintiffs are public officials, to wit: Fashing is a Judge of the County Court-at-Law; Baca and McGhee are Justices of the Peace; and Ybarra is a Constable. The remaining Plaintiffs are identified as citizens and registered voters of El Paso County and of other counties in the State of Texas. All seek to enjoin the Defendants from enforcing the provisions of the Texas Constitution under attack, contending that the sections in question contravene the rights guaranteed to Plaintiffs in the First, Fifth, and Fourteenth Amendments to the Constitution of the United States. Both Fashing and McGhee assert that they would become candidates for

higher judicial office but for the terms of Article XVI, Section 65, which would cause the automatic vacation of their present offices. According to Ybarra, the same fact prevents his candidacy for Justice of the Peace. Baca additionally asserts that he would consider a candidacy for the Texas Legislature were it not for the provisions of Article III, Section 19, which prohibit his filing for that position. The voter Plaintiffs all contend that they desire to vote for and support the candidacy of the public official Plaintiffs for the offices mentioned, but are being deprived of that right in violation of the United States Constitution.

Some of the named Defendants, to wit: The County Judge and County Commissioners of El Paso County and the County Democratic Party officials, have announced that they do not contest the Plaintiffs' suit, and they agree with Plaintiffs' contention that the sections in question are unconstitutional. The Governor, Attorney General, and the Secretary of the State of Texas, however, continue to defend the suit, and deny that Plaintiffs are entitled to any relief. All material facts have been stipulated by the parties, and the case is before the Court on the State officials' motion to dismiss and on cross-motions for summary judgment.

I. The Sections Challenged

Article III, Section 19, of the Constitution of Texas, adopted in 1876, provides as follows:

> "No judge of any court, Secretary of State, Attorney General, Clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature."

The language of this section has remained virtually unchanged since the first Texas Constitution in 1836. It traces back to a 1701 Act of the British Parliament, which forbade persons holding an office under the King from serving in the House of Commons, thereby preventing any undue influence of the executive upon the Parliament. Vernon's Texas Const. Ann., Art III, §19, Interpretive Commentary. Texas case law has held invalid the election or candidacy of an officeholder whose term of office extends into the term of the Legislature to which he seeks election, even if he has vacated the previous office. *Kirk v. Gordon*, 376 S.W.2d 560 (Tex.Sup. 1964); *Willis v. Potts*, 377 S.W.2d 622 (Tex.Sup. 1964). Furthermore, the term "lucrative office under . . . this State" has been broadly interpreted to include virtually all officials of cities and counties. *Willis v. Potts, supra*, 377 S.W.2d at 625-6.

By contrast, the challenged portion of Article XVI, Section 65, was added to the Texas Constitution in 1958. It provides that

> ". . . if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of his State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled."

The officers covered by the section include county judges and judges of county courts at law, probate, and

domestic relations courts; justices of the peace; constables, district and county clerks; district and county attorneys; sheriffs; county tax collectors, county commissioners and county treasurers. State officials not covered by Section 65 include the Governor; Lieutenant Governor; Attorney General; Land Commissioner; Railroad Commissioners; all members of the legislature; justices or judges of the Supreme Court, Court of Criminal Appeals or Courts of Civil Appeals; district and criminal district judges; judges of family and juvenile courts, and municipal judges.

II. The Motion to Dismiss.

The State Defendants have moved to dismiss the suit, contending that (1) Plaintiffs lack standing, in that they have failed to show an actual injury of such immediacy and reality to warrant a declaratory judgment; (2) the Court lacks subject matter jurisdiction, in that no actual "case or controversy" is presented, (3) suit is barred by the Eleventh Amendment. The first two contentions are without merit. Federal courts are empowered to decide cases arising under 42 U.S.C. §1983, pursuant to jurisdiction conferred by 28 U.S.C. §1343(3) and 28 U.S.C. §§220k, 2202, when the "course of conduct in which the plaintiff plans to engage is clear to the court at the time the suit is filed." *Morial v. Judiciary Commission of the State of Louisiana*, 565 F.2d 295, 298 (5th Cir. 1977)(en banc). Plaintiffs herein have shown by affidavit the course of conduct in which they desire and intend to engage but for the restrictions imposed by Article III, Section 19, and Article XVI, Section 65. Actual conduct which would invoke the operation of the sections under attack is not a prerequisite to challenging their validity. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Indeed, "preconduct challenges to the validity of laws burdening First Amendment rights are among the essential bulwarks of a system of free expression." *Morial v. Judiciary Commission of the State*

of Louisiana, supra, 565 F.2d at 298. The Court has jurisdiction and the Plaintiffs have standing to bring the action.

Neither is suit barred by the Eleventh Amendment. Since *Ex Parte Young*, 209 U.S. 123 (1908), it has been established that a federal court may enjoin a state official from enforcing a state statute that violates the United States Constitution. Such an official is "stripped of his official character," because the state "has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Ex Parte Young, supra,* 209 U.S. at 160. *See also, Alabama v. Pugh,* 438 U.S. 781 (1978); *Hutto v. Finney,* 437 U.S. 678 (1978); *Edelman v. Jordan,* 415 U.S. 651 (1974), all of which uphold injunctive relief against specified State officials. Since the instant suit is not brought against the State of Texas as such, but against designated state officials empowered to enforce the Texas constitutional provisions under attack, the Eleventh Amendment does not bar injunctive relief.

Defendants also assert that Plaintiffs have not alleged nor shown an intent on the part of Defendants to discriminate against them. However, a specific intent to deprive a plaintiff of his constitutional rights is not a prerequisite to liability under §1983. *Monroe v. Pape,* 365 U.S. 167, 198 (1961).

The motion to dismiss by the State Defendants should be denied.

III. Do Article III, Section 19, and Article XVI, Section 65, Violate the United States Constitution?

Plaintiffs claim that the challenged sections impair their First, Fifth and Fourteenth Amendment rights to freedom of speech and freedon of association, to seek and hold elective office, and to vote. Furthermore, they

claim the sections in question violate the Equal Protection Clause of the Fourteenth Amendment.

The right to engage in political activities is not absolute, and both state and federal governments may place restrictions upon the political activities of public employees. *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548 (1973); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973). However, such a restriction is constitutionally permissible only if it is ". . . justified by a reasonable necessity . . . to burden those activities to achieve a compelling public objective." *Morial v. Judiciary Commission of Louisiana, supra,* 565 F.2d at 300. Thus it is necessary to compare the interests asserted by the Plaintiffs with those of the State, to determine whether or not a reasonable necessity has been shown for the imposition of those substantial burdens.

Article XVI, Section 65, is basically a "resign-to-run" rule, and thus invites comparision with the Louisiana rule upheld by the Fifth Circuit in *Morial.* Such comparison immediately reveals that Section 65 goes far beyond the Louisiana statute. In Louisiana, only judges who become candidates for non-judicial offices are required to resign; in Texas, the law additionally expels from office some judges who file for a different judicial office (e.g., a county judge who runs for justice of the peace or sheriff). Since the Texas restrictions are so much broader, the State would have a heavy burden of showing them to be reasonably necessary to achieve a compelling State objective, so as to uphold their validity under the First Amendment. In the case of Section 65, however, it is not necessary to reach that issue, since the Court finds that the classification it creates violates the Equal Protection clause of the Fourteenth Amendment.

To be constitutionally permissible, the classification created by Section 65 must " . . . serve important

governmental objectives," and be " . . . substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1977). The State Defendants argue that Section 65 serves the following objectives: (1) the prevention of abuse of officeholders, not only campaigns, but afterwards, if the candidate loses his bid for a new office; (2) the cumpulsion of incumbents to give their undivided attention to the offices already held; (3) the elimination of any appearance of impropriety during and after campaigns; and (4) the prevention of conflicts of interest. While these are legitimate state interests, the constitution further requires that the classification embodied in Section 65 be reasonably necessary to vindicate these interests. *Morial v. Judiciary Commission of the State of Louisiana, supra*, 565 F.2d at 304. This is the respect in which it fails. Can a classification be upheld which allows a municipal court judge (not covered by Section 65) to run for district judge without resigning his office, while a justice of the peace (covered by Section 65) cannot? How can a rule be justified which permits a district judge to run for the Court of Civil Appeals without vacating his office, while a county court-at-law judge may not do so? Merely to state the questions is to make obvious the answers. The classification fails to serve any proper governmental interest, and it is constitutionally impermissible. *Turner v. Fouche*, 396 U.S. 346, 362-3 (1970); *Carrington v. Rash*, 380 U.S. 89 (1965).

Article III, Section 19, likewise creates classifications that are individiously discriminatory. Some executive and judicial officers who desire to seek legislative office, but whose terms happen to overlap with the legislative term, are barred from running even if they resign their present offices. This prohibition affects mayors and city councilment, whose terms typically end in April of a non-election year, as well as many judges and other officials serving four-year terms. No reciprocal prohibition, however, is placed upon a legislator seeking to run

for mayor or judge. A further distinction is drawn between those executive and judicial officers whose terms end concurrently with the beginning of the legislative term, who may run, and those whose terms overlap the legislative term, who may not run. *See, Willis v. Potts, supra.* Section 19 is not a prohibition against dual office holding, which would be a proper exercise of the state's power.[1] Nor is it reasonably related to the achievement of important governmental objectives, *Craig v. Boren, supra,* but rather embodies distinctions that violate the federal constitutional guarantee of equal protection of the laws. *Turner v. Fouche, supra; Carrington v. Rash, supra; Skinner v. State of Oklahoma ex rel Williamson,* 316 U.S. 535, 540 (1942). See, *Barry v. District of Columbia Board of Elections and Ethics,* 448 F. Supp. 1249, 1253-5 (D.D.C. 1978).

IV. Conclusions.

The Plaintiffs have standing to bring this suit, and the motion to dismiss should be denied. The Court finds that the challenged provisions of Article XVI, Section 65, and Article III, Section 19, of the Texas Constitution contravene the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The Defendants' motion for summary judgment should be granted.

It is therefore ORDERED that Defendants' motion to dismiss be, and it is hereby, DENIED.

It is further ORDERED that the Defendants' motion for summary judgment be, and the same is hereby, DENIED.

---

[1]The State of Texas does prohibit dual office holding elsewhere in its Constitution. Constitution of Texas, Article XVI, Sections 12, 40.

It is further ORDERED that the Plaintiffs' motion for summary judgment be, and the same is hereby, GRANTED.

SIGNED AND ENTERED this 23rd day of January, 1980.

HARRY LEE HUDSPETH
UNITED STATES DISTRICT
JUDGE

JUDGMENT

In accordance with the Memorandum Opinion and Order entered in the above-styled and numbered cause on January 23, 1980.

It is ORDERED, ADJUDGED and DECREED that judgment be, and it is hereby, entered for the Plaintiffs, and the relief sought by the Defendants be, and it is hereby, in all things, DENIED.

SIGNED AND ENTERED this 23rd day of January, 1980.

HARRY LEE HUDSPETH
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JOHN L. FASHING, et al,
Plaintiffs

V.

JUDGE T. UDELL MOORE, et al,
Defendants

NO. EP-78-CA-126

ORDER GRANTING INJUNCTION

In accordance with the Memorandum Opinion and Order, and Judgment, entered in the above-styled and numbered cause on January 23, 1980,

It is hereby ORDERED, ADJUDGED, and DECREED that the Defendants herein be, and they are hereby, ENJOINED from enforcing the provisions of Article 3, Section 19, of the constitution of Texas, and of the last paragraph of Article 16, Section 65 of the constitution of Texas.

SIGNED AND ENTERED this 25th day of January, 1980.

HARRY LEE HUDSPETH
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 80-1107

JOHN L. FASHING, et al.,
Plaintiffs-Appellees,

V.

JUDGE T. UDELL MOORE, et al.,
Defendants,

THE GOVERNOR, THE ATTORNEY GENERAL AND THE SECRETARY OF STATE OF THE STATE OF TEXAS
Defendants-Appellants

Appeal from the United States District Court for the Western District of Texas

OCTOBER 31, 1980

Before AINSWORTH, Circuit Judge,
KUNZIG, Judge,* and
RANDALL, Circuit Judge.

PER CURIAM:

Affirmed on the basis of the Memorandum Opinion and order of District Judge Harry Lee Hudspeth dated January 23, 1980.

AFFIRMED.

*Judge of the United States Court of Claims, sitting by designation.